JUSTICE OF THE PEACE COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY
COURT NO. 13

INGLESIDE RETIREMENT APARTMENTS Plaintiff Below, Appellee	§	
VS	§	C.A. No. JP13-19-003257
PAUL TANNER Defendant Below, Appellant	§	

TRIAL DE NOVO

Heard: July 22, 2019.
Submitted August 12, 2019.
Decided October 15, 2019.

Appearances:

Plaintiff/Appellee represented by David C. Zerbato, Esq.
Defendant/Appellant represented by Dmitry Pilipis, Esq.

The Panel:

Sean P. McCormick, Deputy Chief Magistrate.
Bea Freel, Justice of the Peace.
Kerry Taylor, Justice of the Peace.

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CIVIL ACTION NO: JP13-19-003257

INGLESIDE RETIREMENT APTS VS PAUL TANNER

ORDER ON TRIAL DE NOVO

The History of the Case at Bar.

July 22, 2019, the Court convened for a trial *de novo* on a matter filed by Plaintiff Ingleside Retirement Apartments (hereinafter, "Ingleside") seeking possession of the unit due to a rules violation stemming from an incident that occurred on February 21, 2019. A hearing before a single magistrate occurred on April 22, 2019; a judgement was later issued on June 6, 2019 favoring Ingleside. The Defendant, Paul Tanner (hereinafter, "Tanner") thereafter filed this appeal. At the close of the de novo hearing, the parties were given a briefing schedule in order to allow them the opportunity to further argue what was then believed a salient issue – can criminal acts generally or acts of offensive touching (as defined by 11 Del. Code § 601) specifically be construed to cause or threaten to cause irreparable harm? After much deliberation, the panel finds in favor of Ingleside by majority vote. A Dissent is included within the body of this order.

Facts

Ingleside is a federally subsidized housing facility that limits its residential population to elderly and/or disabled individuals. The Plaintiff claimed that the defendant attacked several employees of Ingleside, three of which were slapped or grasped by Tanner during the course an incident in which he supposedly tried to force himself onto a full elevator. It was also claimed that he attempted to run over or ram staff members with his electric wheel chair. In response Tanner claimed his actions were done in self-defense as staff were attempting to switch off his wheelchair, which provides him with mobility. He claimed that he felt threatened by the staff present during the incident.

Five witnesses testified during the Plaintiff's presentation. Firstly, Kim Buiano (the Director of Senior Services at Ingleside) advised that after she learned that the incident in question had occurred, she consulted the Ingleside Chief Executive Officer Larry Cessna in order to determine what action

Ingleside should take. Ultimately, it was determined that counsel should be consulted and a notice of termination should be sent to Tanner citing 25 Del. Code § 5523(b)[1] as grounds for termination. It is ultimately as result of the notice that this instant matter is now before a three-judge panel. The notice substantially laid out the allegation that Tanner threw punches at one or more staff members and attempted to use his wheel chair as a weapon. The panel found that the notice of termination was sufficient for its purpose and admitted it as evidence.

Secondly, testimony was taken from Shiva Lucas, CNA. Ms. Lucas is employed by Plaintiff as a nurse and health aide to the residents of Ingleside. She advised that the elevators at Ingleside were in the process of replacement; one of the two was entirely out of order while repairs took place. Since having only one elevator operable would substantially effect movement throughout the building, and since the vast majority of residents as Ingleside utilize some form mobility assistance (walkers, wheel chairs, etc.) she advised that aides such as herself were assigned to ride the elevator to help move people on and off at an expedited rate. The elevator she was on was descending to the ground floor. She testified that it was full, having at least one electric wheel chair already on the elevator in addition to other persons. Tanner had signaled the elevator to stop at his floor in an effort to descend to the main floor. When it stopped, Lucas advised that Tanner tried to force his way onto the elevator despite her telling him it was full and that he would have to wait. Lucas explained that there is a rule that only one electric wheelchair was allowed to be on the elevator at a time due to their size. She testified that he was so aggressive in his attempt to board the elevator that she had to push his wheelchair back with her foot while simultaneously pulling another resident behind her in an effort to protect that resident from Tanner's actions. Thereafter, Tanner grabbed her foot and refused to let go – wedging himself in the open elevator door. Since the doors could not close, the elevator could not travel; the two were effectively in a stalemate. They remained so embroiled until another Ingleside employee, Erskin Bennett, arrived at the scene. Lucas advised that Bennett climbed into the elevator over Tanner, freed her foot from his grasp, and then helped her to remove him from the elevator entryway. She advised that she felt threatened and alarmed while Tanner had her foot in his grasp. After Tanner was out of the elevator, Lucas testified that she herself exited the elevator and started to film what next transpired – the stated reason being that she did not want any of the other employees who might intervene to get into trouble. The Plaintiff entered the video itself into evidence.

[1] 25 Del .Code § 5513(b) states in pertinent part: When a breach by a tenant causes or threatens to cause irreparable harm to any person or property . . . the landlord may . . . immediately terminate the rental agreement upon notice to the tenant and bring an action for summary possession.

Mr. Erskin Bennett, a maintenance worker at Ingleside, testified next. He advised that he had a radio and heard something come over it that caused him to believe someone was in distress. He advised that he came down a couple of floors and saw Lucas trying to get Tanner off the elevator while Tanner was holding onto her foot. He entered the elevator, which to his recollection had approximately 7-8 people onboard, and helped Lucas get out of the elevator while also trying to keep Tanner from entering the elevator. He advised that Tanner continued to try and gain entry while Bennett continued to push Tanner's chair back. Once Tanner was completely off the elevator, he pulled up to Bennett in his wheel chair, rose up, and threw a punch in the direction of Bennett. Bennett advised that Tanner then tried to run him down twice with the motorized wheelchair while repeatedly stating "you touch my chair, you're touching me". Bennett advised ultimately that once the incident was over police were contacted and statements were taken. No charges were ever lodged. He closed his testimony by stating that he felt threatened during the course of the altercation due to Defendant using his wheelchair in an attempt to run him down twice. He advised that he is still leery whenever Tanner is around him as a result of the incident.

Plaintiff's fourth witness was Mr. Dale Joseph, another maintenance worker at Ingleside. He too was upstairs from where the incident occurred, and was called to the scene via radio. He testified that when he arrived he saw the Tanner in his motorized wheelchair wedged in the entryway of the elevator; there was a lot of yelling. Joseph approached Tanner's wheelchair in an effort to disable it due to Tanner's attempt to run down Mr. Bennett. When he attempted to stop the chair, Defendant struck him in the side of his face. Witness states the incident occurred on the 5th floor, which is the floor the Defendant resides on. When police arrived, he gave a statement. He did not press any charges because he did not want to make the matter any worse than it already was. Joseph advised did not feel threatened during or after the incident. He opined that Defendant could have left the scene at any time and returned to his unit, but he did not.

Lastly Mr. Larry Cessna, President and CEO of Ingleside, was called. Cessna provided the panel with a more complete understanding of what was at issue with the elevators. Essentially, both elevators were original to the building (erected in 1973) and needed to be replaced. Originally it was estimated that the replacement process would take 10-12 weeks per elevator (There were two elevators. He advised that, in spite of the estimate, work on both was completed in 14 weeks.) Normally the elevator cars have security cameras operating in them; the cameras had to be un-hooked during the course of the replacement process and were not operable on the day in question. The building was not designed with elderly or handicapped individuals in mind but rather for ambulatory people who ride

elevators standing. The elevators had a maximum capacity for ten ambulatory people; that rating did not take into account the additional space (or weight) that walkers and electric wheel chairs take up. Since average age of Ingleside residents was 87 and 184 out of 200 of them utilized a device (walker, wheel chair, etc.) to assist in movement, Cessna recognized how incredibly inconvenient and problematic taking an elevator offline would be for the residents. To that end, he and staff gave a great deal of thought as to how to minimize the inconvenience that was sure to follow. Residents and their families were notified months in advance of the elevator work in an effort to prepare them; services' (such as mealtimes) hours were extended; and, staff (such as Lucas on the day in question) were running the elevators in an effort to expedite entrance and egress of the elevator cars. Despite these precautions, he acknowledged he knew the replacement work would be a great strain for all. He also acknowledged that the "one wheel chair per elevator" rule was not within the written rules incorporated into the lease. It was an oral rule that was not actively enforced – there were no "elevator police," he advised. At no point had he ever sent a 7-day letter as required pursuant to 25 Del. Code § 5513 citing as a rules violation the one wheel chair per elevator rule. Cessna advised his greatest concern that arose from this incident was the potential for harm acts of violence such as those engaged in by Tanner could cause. His concern was not for staff members directly (although in his 27 years of working at Ingleside he did not recall a time where a staff-member had been struck by a resident) but rather over the possibility of resident-on-resident violence. Reminding the panel that the average age of a resident at Ingleside was 87 years old, he said "If 87 falls, 87 dies. We've seen it."

At the conclusion of Plaintiff's case, the Defense asked all to again review the video of the incident. Thereafter, the Defense offered into evidence the testimony of the Defendant, Paul Tanner. Tanner advised the panel on that morning he had been trying to get onto the elevator for over an hour. It had come several times prior, but was always full. When it arrived the next time, he advised that only 4-5 people were onboard (mostly staff.) He saw no other ambulatory devices within. Accordingly, he attempted to enter the elevator car and became frustrated when stopped by Lucas. He felt that, given the current issue with the elevators, staff (who are fully ambulatory) could have used the stairs to descend – leaving space for other residents on the elevator. He acknowledged he was aware of the "one wheel chair rule" but advised that it was regularly ignored. He advised he felt helpless when Bennett laid hands on him/his wheel chair and pulled him off the elevator; he interpreted the body motions and gestures exhibited by Bennett thereafter as taunting and provocative – as if he was saying "come on" via his body language. Tanner advised that when he directed his wheel chair in the direction of Bennett he was not trying to run him over so much as to back him off. The arrival of multiple other staff members (at one point there were three maintenance men and Lucas) combined with the grating and taunting tone

of Lucas' voice and condescending language she addressed in his direction made him feel threatened. He did not retreat back to his unit because the maintenance men then present had keys to his unit. He felt that since they could let themselves in if they felt the need that such a form of retreat would not secure him safety. It was for that reason that he instead opted to rise and attempt to throw a punch at Bennett. Thereafter he admitted that when he backed away from staff in the direction of his unit that the maintenance men did not pursue him; still, he maintained a belief that they would have at some point. Tanner advised that he "swatted at Dale [Joseph]" because Dale was behind him attempting to disable his wheel chair, which would have left him helpless. He advised repeatedly (and said repeatedly during the course of the video) that touching his chair was like touching him directly. During the course of the video, Lucas is seen moving two other residents away from the ongoing fray. When asked to identify them, Tanner advised they lived on his floor and were named "Rev. Brown and Thelma."

In addition to the video, an additional and somewhat unusual visual component was offered by the Defense for the panel's consideration – Mr. Tanner intentionally ran into counsel with his wheel chair. Tanner advised during the course of his testimony that his body weight combined with the weight of his wheel chair totaled approximately 500 lbs. The chair has a top speed of 4 mph. At the Defense request, the panel and parties adjourned to the court's parking lot where the Defense demonstrated the potential for harm or personal injury being ran into by a electric wheel chair could cause. Defense counsel stood by while Tanner backed up 8 to 10 feet – and then charged. He struck counsel; counsel suffered (fortunately) no visual injuries. The Defense later argued that the demonstration indicated that Bennett – who seemed young, healthy, and strong – was in no danger of injury even if Tanner had struck him with the wheel chair.

At the close of the matter, the issue raised by Counsel in their closing revolved around whether criminality generally rises to the threshold specified within 25 Del. Code § 5513(b) – in that it causes or threatens to cause ***irreparable*** harm. [emphasis added.] Plaintiff thought caselaw existed that supported his position; the Defense thought caselaw existed that spoke specifically to the issue of offensive touching. Accordingly, a briefing schedule was arrived at in order to allow the parties to underscore their arguments.

Discussion

Upon reviewing counsels' submissions, it is clear that there is no specific definition or application of the term "irreparable harm" as it relates to the landlord-tenant code. Plaintiff's brief advised that "It is clear that this Court has interpreted the standard found in 25 Del. Code § 5513(b)

broadly to encompass a wide variety of factual circumstances. . ." Accordingly, both parties tried to better define the term. The Defense brief cited *Courtyard Apartments v. Davis,* C.A. J02-03-018013 (De Novo Appeal May 10, 2002) at p.3 in an effort to supply an adequate definition. "The standard for proving irreparable harm are high and Black's Law Dictionary and the use of words like '...includes an injury... Which ought not be submitted to on one hand, or inflicted on the other and...cannot receive redress in a court of law". The issue with that definition is that it does not consider the ***threat*** to cause irreparable harm as it contemplated within statute. In-point-of-fact, the actual term within Black's Law Dictionary's that the 2002 panel referred to in an effort to define irreparable harm was actually Irreparable Injury, which itself speaks to an actual injury, not the mere possibility or threat of injury.

The issue of *redress* is also raised in *Courtyard Apartments v. Davis.* That matter is very similar to this instant action in that a tenant committed an act of offensive touching against a staff member. The 2002 panel found that the victim received proper redress given that her assailant was convicted and a no contact order was imposed as a condition of sentence. Black's Law Dictionary defines redress as satisfaction for an injury or damages sustained. Since the definition does not contemplate the need to give satisfaction for the threat of an injury or damage, we hold it not applicable in the effort to define irreparable harm as it applies to this instant matter.

Additional efforts to define irreparable harm were made. The Defense brief also cited *Carleton Preservation Associates, LLV v. Mignon*, C.A. JP13-16-005276 (De Novo Appeal November 30, 2016) where it was stated that :"Irreparable harm means unable to cure or repair." That definition was further incorporated in the matter of *Cheltenham Village Apts. v. Ortiz,* C.A. JP13-17-009227 (Ufberg, J. February 22, 2018) In which the presiding magistrate defined irreparable harm as "a harm so significant that there is no way to cure it." Still, in that these definitions do not give guidance in how to address the potential for such harm, they seem lacking for our purpose.

Perhaps the worthiest attempt to define the standard applicable to this instant matter was offered by Plaintiff in reminding the panel that since Ingleside is federally subsidized, the applicable standard is the one supplied by federal law. Quoting the matter of Carvel Gardens Associates, LLC v. Kesheena Greene, C.A. JP17-16-006834 (De Novo Appeal July 28, 2017) the brief advises us "that the proper standard to apply to the immediate termination of a resident's lease for criminal conduct is a subsidized housing community is as stated in federal statute and the rental agreement itself: Whether the conduct threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants . . ." (herein, quoting 42 U.S.C.A § 1437(d)(1)(B)(iii).)

In viewing the video, the panel has discussed at length both the behavior of Ingleside staff and their responses throughout the incident. Tanner has been portrayed as unarmed man confined to a wheelchair surrounded by able-bodied staff members who menaced and belittled him. In fact, it was the Defendant's initial aggressive actions that brought staff to the scene. But for Tanner's recklessness in attempting to gain access to the elevator staff would not have been called upon for assistance, and the matter would not be before the Court. Lucas testified that, as she initially blocked Tanner's attempt to enter the elevator, she simultaneously pulled another resident behind her in an effort to protect that resident from Tanner's actions. The video shows her outside of the elevator moving residents – Rev. Brown and Thelma – away from potential harm as Tanner runs his wheelchair in the direction of Bennett. It is here that the threat of irreparable harm becomes evident. The majority of residents at Ingleside are elderly and need assistance in movement. As was succinctly put by Cessna, "If 87 falls, 87 dies." Had Tanner struck another resident with his wheel chair even inadvertently during the course of the altercation, we doubt that Thelma or Rev. Brown would have borne it with the same vigor as did Counsel in the demonstration in the Court's parking lot. Had either been stricken, the damage to them would have likely been irreparable.

Conclusion

As was previously noted within Plaintiff's brief the Court has broadly interpreted irreparable harm in order to encompass a wide variety of factual circumstances. In this instance, it is not so much the attempt to strike staff members that rises to the level of irreparable harm as it is the potential harm his behavior could have caused to others not involved in the fray. It is clear that the initial behavior and subsequent fight engaged in by Defendant substantially breached the terms of the lease and the rules incorporated within it. In this instance, the breach caused or threatened to cause irreparable harm to the health, safety, or right of peaceable enjoyment of the residents of Ingleside. Plaintiff in this instance is well-within their right to terminate the rental agreement. As such, judgment for possession is hereby awarded to Ingleside Retirement Apartments.

IT IS SO ORDERED 15th day of October, 2019

/s/ Sean P. McCormick **(SEAL)**
Deputy Chief Magistrate
For the Majority

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COURT ADDRESS:
1010 CONCORD AVE
WILMINGTON DE 19802

CIVIL ACTION NO:
JP13-19-003257

INGLESIDE RETIREMENT APARTMENTS, PLAINTIFF
VS
PAUL TANNER, DEFENDANT

Order of Dissent.

I write this order in dissent of my colleagues in one specific area, the issue of irreparable harm -- the ability to cure and if this case rises to the level of needing immediate termination versus a mere rules violation. There is no dispute, on my part, that a confrontation between Mr. Tanner and staff occurred. For me the issue is where there was irreparable harm that was not curable. There were no injuries (not that that is required) nor charges filed (again not required.) The staff by their own testimony stated they do their job no differently because of the incident. There is a question of whether anyone else was in danger, but by Mr. Zerbato's own words the female resident in the area was moved by Lucas, so that potential was easily and quickly cured. Once a reasonable staff member was present, the situation ended and there was no further confrontation, again quickly cured. I do not see in this specific instance that there was irreparable harm with no ability to cure, and therefore see no immediate need for eviction. The Director was not even notified of this situation until Monday when the incident occurred on the Thursday prior.

IT IS SO ORDERED 15th day of October, 2019

/s/ Beatrice A. Freel **(SEAL)**
Justice of the Peace